JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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ASSAULT AND BATTERY.

State v. Brooks, Dela. 84 Atl. 225. *Provocation.* No looks nor gestures, however insulting, and no words, however opprobrious or offensive, can amount to a provocation sufficient to excuse or justify an assault.

EVIDENCE.

United States v. McHie, 190 Fed. 586. *Impounding documentary evidence.* A federal court has power to impound books and papers, although the property of a third person and unlawfully or irregularly seized by officers of the government, where they are shown to be essential evidence in a criminal case.

Curry v. State, Md. 83 Atl. 1030. *Evidence of other offenses.* In a prosecution under an indictment charging accused with the unlawful sale of intoxicating liquors to the prosecuting witness at defendant's place of business, evidence that she sold such liquors at her home to other persons than the prosecuting witness was admissible to show that her home where the liquor was obtained was her place of business, and that she kept liquor for sale at the place where the prosecuting witness testified he bought it.

Meno v. State, Md. 83 Atl. 759. A woman on whom an abortion has been performed is not an accomplice, so that her evidence requires corroboration to establish sufficient proof of guilt.

FORGERY.

Morville v. State, Tex. Cr. App., 141 S. W. 98. *Intent.* On trial for forging the name "Austin Bros." to a check it was held to be immaterial that Austin Bros. were indebted to defendant or to his father, and that defendant intended to credit the amount obtained on the check upon this account.

Ex parte Geissler, 196 Fed. 168. *Filling blank check.* Petitioner and Q having jointly engaged in speculative transactions, pursuant to which they were jointly indebted for over 15,000 marks, petitioner produced a check, signed by him in his firm name, the amount and date being left blank, and asked Q to indorse it in blank, telling him that he was going to see the creditor and arrange the matter with him, that perhaps he would not need to fill the check at all, and in any case would not fill it out for more than 3,000 or 4,000 marks. Q, ultimately indorsed the check, relying on the promise, after which petitioner filled it up for 15,287 marks 65 pfennings, dating the check some months in advance, and delivering it to the creditor. Held, that, as between petitioner and Q, the filling up of the check for an amount larger than that specified in the agreement, but less than the amount of their joint indebtedness, was a mere breach of confidence reposed by one partner in another, and did not constitute forgery.

FORMER JEOPARDY.

Jacobs v. State, Ark., 141 S. W. 489. *Simultaneous Offenses.* Five indictments were brought against defendant charging him respectively with exhibiting gambling devices commonly called (1) Klondike; (2) a crap table; (3) roulette; (4) faro bank; and (5) bird cage. He pleaded guilty to the first indictment, charging the exhibition of Klondike, and was sentenced. On the trial of each

of the other four indictments he pleaded former conviction. The pleas were overruled and he was sentenced on each of the other charges. It was agreed that all of the devices were exhibited at the same time and place. The statute made it a misdemeanor to "set up, keep or exhibit any gaming table or gambling device." Held that each exhibition is prohibited by the statute, rather than the business of operating a gambling house. Upon trial of the indictment charging the exhibition of Klondike he could not have been convicted on proof that he had exhibited roulette, or any of the other devices named in the other indictments. Hence he had not been in jeopardy on these other charges. All the convictions were affirmed.

GRAND JURY.

People v. Donaldson, 99 N. E. 62 (Ill.) *Time of Selection.* Jury Act (Hurd's Rev. St. 1909, c. 78), sec. 9, requires the summoning of grand jurors twenty days before the day on which they are required to appear. Held, that the intervening time as fixed was for the convenience of the sheriff in serving the jurors and of the jurors themselves, and not for the protection of persons whose cases were to be investigated; and hence the provisions for the time that should elapse were directory only, so that an indictment was not fatally defective, because the grand jury returning the same was drawn only nineteen days before they were required to appear.

HOMICIDE.

State v. Brooks, Dela. 84 Atl. 225. *Self-Defense. Duty to Retreat.* Though decedent first attacked accused, and the attack was of such a character as to create in accused's mind a reasonable belief that he was in danger of death or great bodily harm, accused was bound to retreat if he could safely do so, or use such other reasonable means as were within his power to avoid killing decedent.

State v. MacFarland, N. J. 83 Atl. 993. *Evidence.* A husband was convicted of the murder of his wife by the administration of poison. The evidence was circumstantial. The state introduced a series of letters found in the possession of the defendant, in which the writer, an unmarried woman, expressed the most passionate love for him and a confident reliance upon his promise to marry her as soon as he got rid of his wife by a divorce. Held, that the letters were properly admitted to show a motive for the crime and to repel the presumption arising from the matrimonial relation; but that it was error to permit their use as evidence that the defendant had in fact said that he would soon get rid of his wife by divorce.

INDICTMENT AND INFORMATION.

State v. Oleksy, Dela. 84 Atl. 7. *Constitutional Law.* Rev. Code. 1852, amended to 1893, p. 419 (Del. Laws, c. 384), sec. 12, which provides that, in prosecutions against any vendor of intoxicating liquors, it shall not be necessary to allege that the defendant had no license, but that the fact of license shall be matter of defense under the plea of not guilty, does not violate Const. art. 1, sec. 7, requiring an indictment to plainly inform the defendant of the nature of the accusation against him.

Bailey v. State, Tex. Cr. App., 141 S. W. 224. *Clerical Error.* An indictment for incest charged that the defendant did "unlawfully, *canally* know, and incestuously have carnal knowledge of" his niece. Held that as the context

clearly shows that "carnally" was meant, the misspelling could not have prejudiced the substantial rights of the defendant. The record was sufficiently certain so that the judgment could be pleaded in bar should he be again prosecuted for the same offense; the charge was in such ordinary and concise language as to enable a person of common understanding to know what was meant, and with that degree of certainty that gave the defendant notice of the particular offense with which he was charged, and it enabled the court to pronounce the proper judgment. The conviction was affirmed.

Latham v. State, Tex. Cr. App., 141 S. W. 953. *Clerical Error.* A statute provided for the punishment of seduction under promise of marriage. An indictment under the statute charged a seduction "by means and in virtue of a *prom* of marriage." Held that as the allegation of a promise of marriage was material, and no other words in the indictment alleged such a promise, the indictment was fatally defective, and defendant's motion to quash the indictmnet should have been granted by the trial court. The case of *Bailey v. State* was distinguished on the ground that in that case the word "canally" could be rejected as surplusage and the indictment would still charge the offense. The conviction was reversed.

Morville v. State, Tex. Cr. App., 141 S. W. 98. *Allegation of Partnership.* An indictment for forging a check signed "Austin Bros." did not allege that Austin Bros. was a partnership nor give the names of the members of the firm. Held, overruling an earlier decision and following later cases, that the indictment was sufficient. In spite of the omission of these allegations the state was properly permitted to prove that Austin Bros. was a partnership to identify its members, and prove that none of them had signed or authorized the check.

Jackson v. State, Ala. App. 57 So. 594. *Custody or Possession.* The defendant lived with her father and mother as a member of their family. Her father had a sum of money which was kept in her trunk. She had the key to the trunk, had used some of the money for the legitimate purposes of herself or of the family, and her father had not objected. At the instigation of a married man, she took the entire fund remaining and eloped with him, without her father's consent. Held that as she was legally her father's servant, the money was in her bare charge or custody, so that in taking it she committed a trespass, and if she took it animo furandi, was guilty of larceny.

SENTENCE.

People v. Finucan, 135 N. Y. S. 935. *Place of Imprisonment.* Laws 1905, c. 173, abolished Kings county penitentiary and provided that all commitments which might have been made thereto should be made to some penitentiary in the city of New York, Penal Laws, (Consol. Laws 1909, c. 40) sec. 2181, provides that, on conviction of a crime for which the penalty is imprisonment for a term less than one year, the imprisonment must be by confinement in the county jail, and Prison Law (Consol. Laws, c. 43) sec. 320, empowers boards of county supervisors to agree with the board of a county having a penitentiary therein to keep any person sentenced for a term not less than 60 days, and Code Cr. Proc. sec. 764, provides for a judgment on appeal without regard to technical errors or defects. Defendant under a valid conviction for assault was sentenced for six months to a penitentiary which did not then exist as a place of detention. Held, in the absence of anything to negative a contract with another county

having a penitentiary, that such defect in the certificate of commitment was technical, and that under the Code of Criminal Procedure the County Court had authority to modify the sentence by correcting the technical defect in respect to the place of imprisonment.

People v. Rosen, 135 N. Y. S. 1049. *Habitual Criminal Act Construed.* Penal Law (Consol. Laws 1909, c. 40), art. 90, sec. 1020, provides that where a person is convicted of a felony who has previously been convicted in this state of any other crime, or where a person is hereafter convicted of a misdemeanor who has been already five times convicted, he may be adjudged an habitual criminal; and section 1021 provides for the supervision of the person of an habitual criminal, the same provisions being contained in Code Cr. Proc. sec. 510-514a. Penal Law (Consol. Laws 1909, c. 40), sec. 1941, provides that a person who, after having been convicted within this state, of a felony or attempt to commit a felony, or under the laws in any other state, of a crime which, if committed in this state, would be a felony, commits a crime, is punishable upon conviction of such second offense by certain added penalties, and Penal Law (Consol. Laws 1909, c. 40) sec. 2189, provides for an indeterminate sentence of persons never before convicted of crime. Held, that to support a conviction as an habitual criminal, the indictment need not allege the prior conviction, all that is required being that the prior conviction be established by competent evidence, the provisions being wholly different from the provision relating to conviction as a second offender, so that one convicted of burglary might be adjudged an habitual offender and given a sentence other than the indeterminate one, though the indictment did not charge a former conviction.

Ex parte Sargood. Vt. 83 Atl. 718. *Cumulative Sentence.* A statute is not to be given a construction at variance with established rules of procedure unless the intention of the Legislature is plain, so that P. S. 2362, providing that a person convicted of two or more offenses, punishable by imprisonment and sentenced at the same time for more than one of such offenses, may be sentenced to as many terms of imprisonment, as there are offenses of which he is convicted, one term being limited to commence upon the expiration of the other, does not limit the power of the courts to impose cumulative sentences to the same term of court at which the first sentence was imposed; the common law allowing the imposition of such sentences at subsequent terms.

SUSPENDED SENTENCE.

Fuller v. State, Miss., 57 So. 806. *Common Law Power.* The original opinion in this case was noted in the Journal for September on page 430. On rehearing it was held that as the power to suspend the execution of a sentence is not essential to the existence or protection of a court, nor essential to the due administration of justice, courts have no such inherent common law power. But as the order suspending the execution of the sentence during the good behavior of the defendant was void, he could have been taken into custody immediately. As he did not ask to be taken into custody he cannot object to the delay, but is in the same situation as though he had escaped from custody. In such cases a sentence is not satisfied until it has been served. Hence it is immaterial that a longer time has elapsed than was fixed for the duration of the imprisonment. The order committing the defendant to jail to serve the sentence was reaffirmed.

TRIAL.

Kalen v. U. S. 196 Fed. 888. *Harmless Error.* Where a defendant indicted on two counts was convicted on both and given less than the maximum sentence permissible under either one, it is no ground for reversal of the judgment that one of the counts may have been defective.

Hyde v. U. S., 32 Sup. Ct. Reps. 793. *Delay in Filing Plea in Abatement.* Pleas in abatement, alleging irregularity in the making up of the list of jurors from which the grand jury which found the indictment was selected, were filed too late where four years had then elapsed since the finding of the indictment, and nearly two years since the filing of the mandate of a Federal circuit court of appeals, sustaining the action of the trial court in overruling a demurrer to the indictment, and a bill of particulars had been demanded and furnished.

Clark v. State, Ala. App. 57 So. 1024. *Insufficient Venire.* The judge ordered the sheriff to summon a venire of 61 persons, from whom the jury to try the appellant was to be selected. The sheriff summoned only 59. A jury was selected and the appellant tried and convicted. Held as the venire was illegal the judgment must be reversed.

Whitehurst v. State, Ala. App., 57 So. 1026. *Verdict and Sentence in the Absence of Counsel.* At a trial on a charge of felony, the court received the verdict and imposed sentence while the defendant's counsel was absent. The defendant was present and made no objection. On learning that counsel had not been present the court offered to poll the jury, and reduced the sentence from six to five years. Held that while the court should be extremely careful in acting in the absence of the defendant's counsel, as through some mistake grave injustice might be done, the law does not require that counsel shall be present. As no prejudice was shown in this case the conviction was affirmed.

Gurley v. State, Miss., 57 So. 565. *Comment on Failure of Defendant to Testify.* On a trial for murder it appeared that the defendant and the deceased each had shot the other. The defendant did not take the stand. His counsel, in argument, said that if deceased had gotten well and defendant had died, deceased would have been on trial perhaps, instead of the defendant, on a similar charge. In commenting on this statement counsel for the state said that in that case deceased "would have mounted the stand and told how that occurred." On objection to the statement the court sustained the objection, instructed the jury not to regard it, nor any statement as to the defendant's not testifying, and charged that no prejudice could result from the defendant's failure to testify. Held that the statement held up to the jury the defendant's failure to testify. The action of the court could not and did not restore his statutory right to the defendant. Hence the conviction was reversed.

Wilcek v. State, Tex. Cr. App., 141 S. W. 88. *Comment on Failure of Defendant to Testify.* In argument the prosecuting attorney said "The defendant's defense in this case is,— Although he has offered no testimony to that effect, I do not mean to refer to his failure to testify." On objection by the defense and admonition by the court he said, "I have not referred to defendant's failure to testify. On the contrary, I stated to the jury that I did not so mean to refer to that fact." Held to be clearly an allusion, forbidden by the statute, and so requiring reversal.

Martin v. Commonwealth, Ky., 141 S. W. 54. *Reopening Case.* In a trial for breaking and entering a railroad station, the state connected the defendant with the crime by a witness who testified that he looked through a crack when the crime was committed and saw the defendant leave the station. After all the evidence had been heard and both sides had announced that they had no more testimony to offer, the judge adjourned court till the next morning. The next morning the defense asked that the case might be reopened, as two witnesses would testify that the crack was not of such size nor so located that it was possible to look through it and see a person leave the station. The state objected because the case had been closed, the witnesses been discharged and gone to their homes, and if the evidence was received a continuance would be necessary to get rebuttal evidence. The judge refused to reopen the case. Held that while the control of the trial rests largely in the wise discretion of the trial judge, whenever his action prejudices the substantial rights of the defendant it will be treated as reversible error. Without the identification the defendant could not have been convicted. The offered evidence contradicted this identification and was not merely cumulative, as there was no other contradicting evidence in the case. Hence the conviction was reversed.

VARIANCE.

Campbell v. State, Ala. App., 57 So. 412. *Ownership of Stolen Property.* An indictment charged the larceny of money, the property of one Patrick. The proof was that Patrick and other members of a gang of laborers were being paid. The paymaster counted out the money due Patrick, put it on the counter, and turned his head away, while Patrick had turned to sign the pay roll. The money disappeared. Patrick found it in the defendant's possession a few minutes later, took it from him and returned it to the paymaster. The paymaster counted it and handed it to Patrick. It was contended that neither title to, nor possession of the money had passed to Patrick when the defendant stole it. Held that when the money was counted out and placed on the counter it was a delivery to Patrick, even though he had not put his hands upon it, and did not know it had been put there for him. The conviction was affirmed.

VERDICT.

State v. Nelson, La., 57 So. 1003. *Disagreement When Polled.* On the trial of a capital case before a jury of twelve men, a verdict of "guilty as charged" was returned. When the jury was polled one juror answered that "it was not his verdict." The state constitution requires that in capital cases there shall be a jury of twelve, "all of whom must concur to render a verdict." Held that the sentence should be annulled and the case remanded.

Hyde v. U. S., 32 Sup. Ct. Reps. 793. *Impeaching Verdict by Testimony of Jurors.* The verdict of a jury, convicting two of the four defendants on trial for criminal conspiracy, and acquitting the others, cannot be impeached by the testimony of the jurors tending to show that such verdict was the result of a bargain, or was induced by coercion from the court.

WEAPONS,

People v. Pignatoro, 136 N. Y. S. 155. *N. Y. Statute Construed.* Penal Law (Consol. Laws 1909, c. 40), sec. 1896, 1897, 1899, as amended by Laws of 1911, c. 195, respectively provide that a person who manufactures specified deadly weapons or sells or keeps for sale the same to any person under the age of 16

years is guilty of a misdemeanor; that a person who attempts to use against another or carries or possesses any instrument or weapon such as a blackjack, dagger, dangerous knife, or other deadly weapon is guilty of a felony, that an unlicensed person over the age of 16 years who shall have in his possession in any city any pistol or firearm which may be concealed upon the person shall be guilty of a misdemeanor, or if he shall carry it concealed upon his person he shall be guilty of a felony, and any person, not a citizen, who shall carry firearms or dangerous weapons in any public place, shall be guilty of a felony, and that the unlawful carrying of any such weapon by one not a peace officer is a nuisance. Held, that, as the purpose of the law was to prevent the unlawful carrying of weapons by thugs and criminals, minors, and aliens, the act is within the police power of the state; but, as the right to defend one's person and one's property is elemental, this act does not preclude such a defense, and in view of Penal Law, sec. 1898, providing that the possession by any person other than a public officer of any such weapon is presumptive evidence of an intent to use it in violation of law, the carrying of a concealed weapon without a license, where it is procured for the immediate defense of his person or property, is not unlawful, and the possessor is not guilty of a felony.

WITNESSES.

Commonwealth v. Spencer, Mass. 99 N. E. 266. Under St. 1870, c. 175, sec. 1 (Rev. Laws, c. 175, sec. 20), providing that any person, though a party, may testify in any proceeding, but that neither husband nor wife shall testify as to private conversations and neither husband nor wife shall be compelled to testify in the trial under an indictment or other criminal proceeding against the other, and that an accused may testify in his own behalf, but his neglect or refusal to testify shall not create any presumption against him, a wife is a competent, but privileged witness in a criminal prosecution against her husband, and she alone may refuse to testify; and as the statute does not provide that her failure to testify shall not raise any presumptions against him, an inference may be drawn against defendant where his wife, though having knowledge of certain facts and present at the trial, was not placed on the stand, the ordinary rule that one who makes no attempt to produce evidence under his control does so because it is unfavorable to him applying in this case, as it cannot be presumed the wife would have refused to testify if placed on the stand.